Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in invalidating an EPA rule on the ground that the phrase "any physical change" in the definition of "modification" in Section 111(a)(4) of the Clean Air Act, 42 U.S.C. 7411(a)(4), unambiguously requires EPA to adopt the broadest meaning of the phrase.

PARTIES TO THE PROCEEDINGS

The United States Environmental Protection Agency is the petitioner in this Court and was the respondent in the court of appeals.

The following parties are respondents in this Court and were petitioners in the court of appeals: State of New York; People of the State of California ex rel. Bill Lockyer, Attorney General of California, and California Resources Board; State of Connecticut; State of Delaware; State of Illinois; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of New Hampshire; State of New Jersey; State of New Mexico ex rel. Patricia Madrid, Attorney General and Ron Curry, Secretary of the Environment Department; Commonwealth of Pennsylvania, Department of Environmental Protection; State of Rhode Island; State of Vermont; State of Wisconsin; District of Columbia; City of New York; City of San Francisco; City of Groton, Connecticut; City of Hartford, Connecticut; City of Middletown, Connecticut; City of New Haven, Connecticut; City of New London, Connecticut; City of Stamford, Connecticut; City of Waterbury, Connecticut; Town of Cornwall, Connecticut; Town of East Hartford, Connecticut; Town of Greenwich, Connecticut; Town of Hebron, Connecticut; Town of Lebanon, Connecticut; Town of Newtown, Connecticut; Town of North Stonington, Connecticut; Town of Pomfret, Connecticut; Town of Putnam, Connecticut; Town of Rocky Hill, Connecticut; Town of Salisbury, Connecticut; Town of Thompson, Connecticut; Town of Wallingford, Connecticut; Town of Washington, Connecticut; Town of Westbrook, Connecticut; Town of Westport, Connecticut; Town of Weston, Connecticut; Town of Woodstock, Connecticut; South

Coast Air Quality Management District; Natural Resources Defense Council; Environmental Defense; Sierra Club; American Lung Association; Communities for a Better Environment; United States Public Interest Research Group; Alabama Environmental Council; Clean Air Council; Group Against Smog and Pollution; Michigan Environmental Council; The Ohio Environmental Council; Scenic Hudson; Southern Alliance for Clean Energy; Delaware Nature Society.

The following were intervenors in the court of appeals: Adirondack Mountain Club; Commonwealth of Virginia; State of Alabama; State of Alaska; State of Arkansas; State of Kansas; State of Missouri; State of Nebraska; State of North Dakota; State of South Dakota; State of Utah; State of Wyoming; Clean Air Implementation Project; Utility Air Regulatory Group; National Environmental Development Association's Clean Air Regulatory Project; Equipment Replacement Rule Coalition; Alliance of Automobile Manufacturers; Illinois State Chamber of Commerce; Illinois Environmental Regulatory Group; Steel Manufacturers Association; Specialty Steel Industry of North America; American Iron and Steel Institute.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory and regulatory provisions involved 2
Statement 2
Reasons for granting the petition 9
A. The decision below is incorrect 11
B. The question presented is important and warrants review at this time 20
Conclusion 26

TABLE OF AUTHORITIES

Cases:

Bragdon v. *Abbott*, 542 U.S. 624 (1998) 20
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 9, 11, 14, 15
Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989) 12
Department of Housing & Urban Dev. v. *Rucker*, 535 U.S. 125 (2002) 12, 13, 14
FDIC v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986) .. 20
Flora v. *United States*, 362 U.S. 145 (1960) 13
Harrison v. *PPG Indus.*, 446 U.S. 578 (1980) 12
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 13
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 125 S.Ct. 2688 (2005) 11
Nixon v. *Missouri Mun. League*, 541 U.S. 125 (2004) 7, 13
Norfolk S. Ry. v. *Kirby*, 543 U.S. 14 (2004) 7, 12

Cases—Continued: Page

Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 16
Sierra Club v. *Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972), aff'd, 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. Nov. 1, 1972), aff'd by an equally divided court, 412 U.S. 541 (1973) 3
Small v. *United States*, 544 U.S. 385 (2005) 13
TWA v. *Hardison*, 432 U.S. 63 (2004) 16, 19, 20
United States v. *Gonzales*, 520 U.S. 1 (1997) 12
United States v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818) 12, 13
Wisconsin Elec. Power Co. v. *Reilly*, 893 F.2d 901 (7th Cir. 1990) 5
Young v. *Community Nutrition Inst.*, 476 U.S. 974 (1986) 16

Statutes and regulations:

Act of Nov. 16, 1977, Pub. L. No. 95-190, § 14(a)(54), 91 Stat. 1402 3
Clean Air Act, 42 U.S.C. 7410 *et seq.* 2
42 U.S.C. 7407(a) 2
42 U.S.C. 7409 2
42 U.S.C. 7410 2
42 U.S.C. 7410(a)(2)(C) 2, 4
42 U.S.C. 7411(a)(2) 4
42 U.S.C. 7411(a)(3) 14
42 U.S.C. 7411(a)(4) ..... *passim*
42 U.S.C. 7470-7479 3
42 U.S.C. 7475(a)(4) 3

Statutes and regulations—Continued: Page

42 U.S.C. 7478(a) 19
42 U.S.C. 7479(1) 4
42 U.S.C. 7479(2)(C) 14, 19
42 U.S.C. 7501-7515 3
42 U.S.C. 7501(3) 3
42 U.S.C. 7501(4) 4
42 U.S.C. 7503(a)(2) 3
Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 4
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 3
40 C.F.R.:
Section 52.21(b)(2)(i) 18
Section 52.21(b)(2)(iii) 17
Section 52.21(b)(23) 18
Section 60.2(h)(2)(i)-(iii) 16
Section 60.14(e)(1) 4
Section 60.14(e)(2) 17
Section 60.14(e)(3) 17
Section 60.14(e)(4) 17

Miscellaneous:

36 Fed. Reg. 24,877 (1971) 4, 16
39 Fed. Reg. (1974):
p. 42,510 3
p. 42,514 ..... 5, 17, 19

Miscellaneous—Continued: Page

41 Fed. Reg. (1976):
p. 55,524-55,525 5
p. 55,558 5
43 Fed. Reg. 26,403 - 26,404 (1978) 4
67 Fed. Reg. (2002):
p. 80,290 5
pp. 80,292-80,293 5

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Environmental Protection Agency (EPA), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 443 F.3d 880. The order of the court of appeals denying rehearing (Pet. App. 18a-19a) is unreported. The order of the Environmental Protection Agency (Pet. App. 20a-175a) is reported at 68 Fed. Reg. 61,248.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2006. A petition for rehearing was denied on June 30, 2006. On September 21, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 30, 2006. On October 23, 2006, Justice Stevens further extended the time to November 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant sections of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, and of EPA's rules are set forth in the appendix to this petition at 176a-181a.

STATEMENT

1. Under the Clean Air Act, each State must establish a plan for attaining, and then maintaining, nationally established standards for airborne levels of six "criteria" pollutants. Specifically, the Act directs EPA to promulgate National Ambient Air Quality Standards (NAAQS) specifying allowable concentrations of each criteria pollutant in the ambient air. 42 U.S.C. 7409. Each State must adopt State Implementation Plans (SIPs) for attaining and maintaining the NAAQS in all areas within the State. 42 U.S.C. 7407(a), 7410.

Each SIP must include a program requiring preconstruction review of "the modification and construction of any stationary source within the areas covered by the [SIP] as necessary to assure that national ambient air quality standards are achieved." 42 U.S.C. 7410(a)(2)(C). Depending on the attainment or nonattainment status of the area and the results of the pre-

construction review, the source may be required to install pollution controls as part of the construction or modification.[1] Those preconstruction review and permitting requirements are known collectively as the New Source Review (NSR) program. Congress adopted the statutory major source NSR program as part of the 1977 amendments to the Act. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.[2] Prior to enactment of the statutory NSR program, EPA had promulgated a regulatory PSD program in response to a lawsuit claiming that the Act required EPA to ensure that air quality did not deteriorate in areas meeting the NAAQS. See *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), aff'd without opinion, 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. Nov. 1, 1972), aff'd by an equally divided court, 412 U.S. 541 (1973); see also 39 Fed. Reg. 42,510 (1974).

Since 1977, when Congress created the statutory NSR program, the Act has defined "modification" by cross-reference to the statutory definition of that term in the Act's New Source Performance Standards (NSPS)

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[1] In areas meeting the NAAQS (attainment areas) and in "unclassifiable" areas, the "Prevention of Significant Deterioration" (PSD) requirements under Part C of Title I of the Act apply. See 42 U.S.C. 7470-7479. Permits for major sources subject to PSD must require the facility to employ the "best available control technology," or BACT. 42 U.S.C. 7475(a)(4). In areas not meeting the NAAQS (nonattainment areas), the nonattainment NSR requirements of Part D of Title I of the Act apply. See 42 U.S.C. 7501-7515. Permits for major sources subject to nonattainment NSR must require that the facility achieve the "lowest achievable emission rate," or LAER. 42 U.S.C. 7501(3), 7503(a)(2).

[2] Initially, only the nonattainment NSR program was made applicable to "modified" sources. In a later technical amendment, Congress clarified that the PSD program also applies to such sources. Act of Nov. 16, 1977, Pub. L. No. 95-190, § 14(a)(54), 91 Stat. 1402.

program, originally included as part of the 1970 amendments to the Act.[3] Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Under that definition, a modification is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4) (NSPS definition); see 42 U.S.C. 7479(2)(C) (for PSD, "'construction' * * * includes the modification (as defined in section 7411(a) of this title) of any source or facility"), 7501(4) (for nonattainment NSR, "'modifications' and 'modified' mean the same as the term 'modification' as used in section 7411(a)(4) of this title.").

EPA regulations have long excluded some activities from the definition of "modification." For instance, since 1971, EPA regulations elucidating what constitutes a "modification" for purposes of NSPS have provided that "[r]outine maintenance, repair, and replacement" (RMRR) of equipment at a source is not a "modification." See 36 Fed. Reg. 24,887; see also 40 C.F.R. 60.14(e)(1); Pet. App. 119a. The regulations that EPA promulgated in 1974 to implement the original regulatory PSD program defined "modification" in largely the same way as it was defined for the existing NSPS program, and they treated RMRR comparably to its treat-

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[3] In those 1970 amendments, Congress defined a "new source" to include stationary sources "the construction *or modification* of which" began after a specified time. 42 U.S.C. 7411(a)(2) (emphasis added). Major stationary sources are stationary sources that exceed annual emission tonnage thresholds in the CAA. 42 U.S.C. 7479(1), 7602(j). For sources below the major thresholds, the 1977 amendments did not impose the provisions of parts C and D. For those "minor" sources, Section 110(a)(2)(C) alone controls. See 42 U.S.C. 7410(a)(2)(C).

ment in the NSPS program. See 39 Fed. Reg. 42,514.[4] EPA's 1978 regulations that first implemented the statutory PSD program again excluded RMRR from the scope of what constituted a "change" for purposes of the definition of "modification." 43 Fed. Reg. 26,403-26,404; see Pet. App. 121a.

"Routine maintenance" is not defined in any of those regulations. Rather, the RMRR exclusion has, since its inception, relied on a "case-by-case determination * * * weighing the nature, extent, purpose, frequency, and cost of the work as well as other factors to arrive at a common sense finding" of whether the work involved amounted to routine maintenance. Pet. App. 3a-4a (quoting 67 Fed. Reg. 80,292-80,293 (2002)); see *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 910 (7th Cir. 1990).

2. EPA has historically interpreted the RMRR exclusion narrowly, and it has often found that replacement of plant components with identical or functionally equivalent components does not qualify as RMRR. See Pet. App. 31a, 34a. Over time, however, EPA concluded that a narrow interpretation, while reasonable, produced undesirable results.

In 2002, EPA proposed making changes to the RMRR exclusion, 67 Fed. Reg. 80,290, and in 2003, EPA adopted the new Equipment Replacement Provision (ERP) at issue in this case. Pet. App. 20a-175a. EPA noted that, under its pre-ERP approach, "it can be difficult for the owner or operator to know with reasonable certainty whether a particular activity constitutes RMRR." *Id.* at 32a. EPA concluded that its pre-ERP

[4] The pre-statutory PSD program was followed by the first pre-statutory nonattainment NSR program in 1976. 41 Fed. Reg. 55,524-55,525, 55,558.

approach, and the uncertainties associated with it, "tends to have the effect of leading sources to refrain from replacing components, to replace them with inferior components, or to artificially constrain production in other ways," without significant environmental benefits over an alternative approach. *Id.* at 35a. EPA found that its pre-ERP approach "can discourage replacements that would promote safety, reliability and efficiency even in instances where, if the matter were brought to EPA, [the agency] would determine that the replacement in question was RMRR." *Ibid.* In EPA's view "[s]uch discouragement results in lost capacity and lost opportunities to improve energy efficiency and reduce air pollution." *Ibid.*

The ERP, as adopted by EPA, provides that RMRR includes, but is not limited to, an activity if "(1) [i]t involves replacement of any existing component(s) of a process unit with component(s) that are identical or that serve the same purpose as the replaced component(s); (2) the fixed capital cost of the replaced component(s), plus costs of any activities that are part of the replacement activity * * *, does not exceed 20 percent of the current replacement value of the process unit; and (3) the replacement(s) does not alter the basic design parameters of the process unit or cause the process unit to exceed any emission limitation or operational limitation * * * that is legally enforceable." Pet. App. 41a (footnote omitted); see *id.* at 4a. EPA reasoned that equipment replacements that satisfy those requirements would be understood as maintaining existing functions rather than as making a physical change. They would thus satisfy Congress's intent to generally exclude existing plants from the need to obtain NSR permits and "to avoid the need to impose costly retrofits, but require

replacement of new control technology at a time when it makes the most sense for it to be installed." *Id.* at 123a; see *id.* at 126a.

3. The court of appeals held that the ERP violates the Clean Air Act, and it vacated the rule. Pet. App. 1a-17a.

The dispute between the parties has to do with the construction of the phrase "any physical change" in Section 7411(a)(4) of the Act.[5] The court of appeals accepted that the phrase "'physical change' is susceptible to multiple meanings." Pet. App. 5a. The court concluded, however, that the "essential disagreement" in the case "centers on the effect of Congress's decision in defining 'modification' to insert the word 'any' before 'physical change.'" *Id.* at 6a.

The court of appeals noted that "[i]n a series of cases, the Supreme Court has drawn upon the word 'any' to give the word it modifies an 'expansive meaning' when there is 'no reason to contravene the clause's obvious meaning.'" Pet. App. 7a (quoting *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 31-32 (2004)). Although the court recognized that "EPA is correct that the meaning of 'any' can differ depending upon the statutory setting," the court concluded that "the context of the Clean Air Act warrants no departure" from what it believed was "the word's customary effect." *Id.* at 8a (citation omitted). The court noted that, unlike in *Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 132 (2004), where a statute with the term "any" was construed less broadly, "the question of statutory interpretation here does not

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[5] The meaning of a different part of the definition of modification in Section 7411(a)(4)—the phrase "increases the amount of any air pollutant emitted"— is currently before the Court in *Environmental Defense* v. *Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006).

arise in a setting in which the Supreme Court has required heightened standards of clarity to avoid upsetting fundamental policies," and no "strange and indeterminate results * * * would emerge from adopting" what the court believed was "the natural meaning of 'any' in section [7411(a)(4)]." Pet. App. 8a.

In the court's view, other considerations supported its conclusion. The court noted that it "has construed the definition of 'modification' broadly" in other respects. Pet. App. 9a. The court also believed that the term "any" would be rendered superfluous if it were not construed to require an expansive interpretation of the words that follow. *Id.* at 10a. Finally, the court noted that the statute itself imposes limitations on the "physical changes" that are covered; they must "increase[] the amount of any air pollutant emitted * * * or * * * result[] in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4). The court stated that, "[b]ecause Congress expressly included one limitation, the court must presume that Congress acted intentionally and purposely when it did not include others." Pet. App. 12a (citations and internal quotation marks omitted); see *id.* at 17a ("As Congress limited the broad meaning of 'any physical change,' directing that only changes that increase emissions will trigger NSR, no other limitation (other than to avoid absurd results) can be implied.").

The court concluded that "when Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings" and "the agency may not pick and choose among them." Pet. App. 12a; see *id.* at 14a ("Congress's use of the word 'any' indicates the intent to cover all of the ordinary meanings of the phrase."); *id.* at 17a ("Con-

gress's use of the word 'any' in defining a 'modification' means that all types of 'physical changes' are covered."). In the court's view, the pre-existing RMRR exclusion did not contravene that principle, because it was "based on a *de minimis* rationale." *Id.* at 15a. The court held, however, that because "the ERP would allow equipment replacements resulting in non-*de minimis* emission increases to avoid NSR," the ERP rule "violates the Act." *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

The court of appeals vacated the results of a significant rulemaking initiative by EPA that was designed to remedy problems with the former, case-by-case RMRR approach, and thereby ease compliance by regulated entities, lighten administrative burdens on state and federal enforcement agencies, and, ultimately, encourage investment in newer, more efficient, and cleaner facilities. The court of appeals reached that result by holding that, although "physical change" is ambiguous, the phrase "*any* physical change" is unambiguously broad. In so holding, the court not only invalidated a critically important rulemaking but also announced a sweeping rule of construction that would operate to deprive administrative agencies of discretion to construe ambiguous statutory terms whenever those terms are preceded by the word "any"; in the court's view, Congress's use of the word "any" generally compels adoption of the broadest construction of whatever follows, effectively eliminating ambiguities that would otherwise be left for agency interpretation. That holding, with its premise that the single word "any" effectively eliminates agency discretion, is inconsistent with *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and with this Court's

repeated admonitions that statutes must be construed in context and as a whole. Moreover, it threatens to put both EPA and other agencies charged with administering statutes that employ the term "any" in an unwarranted straitjacket.

While the term "any" may be used to connote breadth, it does not express the "clear intent" of Congress to adopt one and only one meaning—namely, the broadest reasonable construction—of the words that follow. It therefore does not preclude the exercise of discretion by EPA to define the phrase "physical change" in a way that reasonably differentiates between routine maintenance (which, as the phrase suggests, maintains rather than changes an entity) and physical changes. Indeed, the logic of the D.C. Circuit's construction of the word "any" would endanger far more than just the EPA's current rulemaking. Before EPA's promulgation of the ERP, there was a long history of a variety of exclusions—including in the regulatory program on which Congress modeled the PSD provisions of the Act—from the scope of a "physical change * * * or change in the method of operation," 42 U.S.C. 7411(a)(4). Those exclusions cannot be justified on the rationale that they cause only a de minimis increase in emissions (and even a de minimis exclusion itself would be hard to square with the court of appeals' construction of "any," taken to its logical extreme). Accordingly, all of those exclusions (including applications of even the original RMRR exclusion itself) are placed into jeopardy by the court of appeals' holding in this case.

Absent this Court's review, the court of appeals' decision on this petition for review will be the final word on this important regulatory initiative, and it will threaten related and similarly significant Clean Air Act exclu-

sions. Equally important, given the role of the D.C. Circuit in review of agency regulations generally, that court's unjustifiably broad reading of the common statutory term "any" to eliminate virtually all ambiguity in the terms that follow will needlessly and improperly limit agency action in a wide variety of areas. Further review is warranted.

A. The Decision Below Is Incorrect

1. The court of appeals acknowledged that, in promulgating the ERP, EPA was construing the definition of "modification" in the Clean Air Act, and that the validity of EPA's interpretation was accordingly governed by the principles of *Chevron*. See Pet. App. 5a. Under those principles, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. If the intent of Congress is not "unambiguously expressed," however, *Chevron* "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005).

The court of appeals in this case correctly recognized that the phrase "physical change" is ambiguous, and it did not dispute that the ERP would represent a permissible construction of that phrase. See Pet. App. 5a-6a (citing various dictionary definitions of "change," including "make over to a radically different form"). Relying almost exclusively on Congress's use of the word "any," however, the court concluded that the phrase "any physical change" is *un*ambiguous, and that it necessarily en-

compasses everything covered by "all of the ordinary meanings of the phrase." *Id.* at 14a. That conclusion contravenes this Court's consistent recognition that a statutory term must be construed not in isolation, but in light of its entire context. *E.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The mere addition of the word "any" is insufficient to establish that Congress had a clear intent that the phrase "physical change" must necessarily be given its broadest meaning.

This Court has a long history of considering the import of the word "any," beginning with *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.). In some cases, the Court has concluded that use of the word "any" was intended to give the term that follows an "expansive meaning." See, *e.g.*, *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 31-32 (2004); *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 130-131 (2002); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Harrison* v. *PPG Indus.*, 446 U.S. 578, 588-589 (1980). Those cases, however, generally involved the Court's own determination of the best meaning of the language at issue, not the clearly distinct question presented in the *Chevron* context, namely, whether an agency interpretation of statutory text is reasonable. In *Norfolk Southern*, for example, the Court addressed "a simple question of contract interpretation," 543 U.S. at 30; in *Gonzales*, a criminal sentencing statute; and in *Harrison*, the jurisdiction of federal courts of appeals. An agency interpretation of a statute was involved in *Rucker*, but the Court *agreed* with the agency construction at issue, see 535 U.S. at 130, and, as in the other cases cited above, the Court expressly relied on a combination of factors—not merely the word "any" alone—to support its conclusion that the phrase "any drug-related

criminal activity" did not contain an implicit knowledge requirement. *Id.* at 130-131 ("Congress' decision not to impose any qualification in the statute, *combined with* its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement.") (emphasis added).

Moreover, the Court has concluded in other cases that, while the word "any" does suggest breadth, it does not necessarily mandate the broadest interpretation of what follows. See, *e.g.*, *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("'any' can and does mean different things depending upon the setting"); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981); *Palmer*, *supra*. More recently, in *Small* v. *United States*, 544 U.S. 385, 388 (2005), the Court noted that "a speaker who says, 'I'll see any film,' may or may not mean to include films shown in another city." The Court concluded that "even though the word 'any' demands a broad interpretation, * * * we must look beyond that word itself." *Ibid.* (citation omitted); see *id.* at 391 ("statutory language, context, history, [and] purpose"); *Nixon*, 541 U.S. at 132 (meaning of the word "any" "depend[s] upon the setting"). As the Court said in *Flora* v. *United States*, 362 U.S. 145, 149 (1960), in connection with the phrase "any sum," "[a] catchall the phrase surely is; but to say this is not to define what it catches."[6]

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[6] The court of appeals suggested that, if "any" does not serve the function of requiring the broadest construction of what follows, it would be superfluous. Pet. App. 10a. That would no more be true in this case than in *Nixon*, *Sea Clammers*, *Palmer*, *Small*, and *Flora*, in each of which this Court did *not* adopt the broadest construction of the statute at issue. In all of those settings, the term "any" continues to serve its ordinary function of suggesting the absence of any *other* limitation once

Indeed, the rule of construction announced by the court of appeals—that "any" ordinarily requires the phrase it modifies to be construed to encompass *all* of its possible "ordinary meanings," Pet. App. 7a—is irreconcilable with this Court's decision in *Chevron* itself, which involved the same statute and the same definitional section at issue here. This Court's analysis in *Chevron* focused on the scope of EPA's discretion to interpret the term "stationary source," which is defined in the Clean Air Act's NSPS provision to mean "*any* building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411(a)(3) (emphasis added). Referring to that definition, this Court emphatically rejected the argument that the statutory text deprived EPA of discretion to adopt an interpretation of "stationary source" that was less inclusive than its broadest possible construction. Even though the Court *agreed* with the respondents' argument that the text "could be read to impose the [NSR] permit conditions on an individual building that is a part of a plant," 467 U.S. at 860, the Court nonetheless concluded that EPA's narrower interpretation was also reasonable. *Id.* at 861. The Court simply was "not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of

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the agency has settled on a reasonable interpretation of the phrase following "any"—here, "physical change." Indeed, it appears that "any" served precisely that function in *Rucker*, for example, where the question was whether to add an extra-statutory knowledge requirement to the statutory phrase "any drug-related criminal activity." See 535 U.S. at 130-131. There was no indication in *Rucker*, by contrast, that HUD would not have discretion to determine whether a crime designed to raise funds to purchase drugs would be sufficiently "drug-related" to satisfy the statute.

Congress," *ibid.*, and instead upheld the agency's view that "the definition itself is flexible," *id.* at 864.

The decision below thus stands in flagrant opposition to *Chevron*. Under the court of appeals' approach, the phrase at issue in *Chevron* would have had to encompass the broadest meaning of "any building," including a building that was part of a larger plant. This Court held the opposite. If the phrase "any building, structure, facility, or installation," 42 U.S.C. 7411(a)(3), need not be given the widest possible meaning, as *Chevron* squarely concludes, it begs credulity to suggest that such breadth is required by the use of "any" *in the very next paragraph of the same Section of the same Act.* This Court's *Chevron* decision compels the conclusion that the rule of construction announced by the court of appeals is wrong, and egregiously so.

2. In the context presented here, the word "any" is plainly not sufficient to establish that Congress had an "unambiguously expressed intent," *Chevron*, 467 U.S. at 843, to adopt the broadest meaning of the phrase that follows ("physical change * * * or change in method of operation") and to permit a narrower reading only when justified on the ground that such a reading would lead to a de minimis impact on emissions. To the contrary, the statutory context demands that a distinction be made between routine efforts to maintain a facility's current method of operation and efforts to change the facility or its method of operation. Not only is there inherent ambiguity in the phrase "physical change * * * or change in the method of operation" in this context—whether or not modified by "any"—but there is also other evidence that Congress wanted to permit a degree of administrative flexibility.

a. As this Court has explained, "where 'Congress has not just kept its silence by refusing to overturn [a prior] administrative construction, but has ratified it with positive legislation,'" that agency's prior construction must be accepted "as a defensible construction of the * * * statute." *TWA* v. *Hardison*, 432 U.S. 63, 76 n.11 (1977) (quoting *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969)). See, *e.g.*, *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 983 (1986). Congress is presumed to legislate with awareness of prior administrative regulations, and when it elects to use statutory language that has already been given an interpretive gloss by the administering agency, it should ordinarily be presumed to intend to allow the agency to continue to employ that regulatory gloss.

That inference of congressional approval is fully applicable here. When Congress enacted the statutory NSR program in 1977, cross-referencing the pre-existing NSPS statutory definition of "modification," it acted in a context in which EPA had already interpreted that key provision to exclude some activities that would fall within the broadest conception of "physical change * * * or change in the method of operation," 42 U.S.C. 7411(a)(4), including activities that unquestionably could increase emissions in non-trivial ways. When EPA originally promulgated regulations to effectuate the NSPS program in 1971, it had, subject to certain conditions, excluded "[a]n increase in the production rate," "[a]n increase in hours of operation," and "[u]se of an alternative fuel or raw material" from the scope of what constitutes a "modification." See 36 Fed. Reg. 24,877 (40 C.F.R. 60.2(h)(2)(i)-(iii)(1972)). When EPA established the regulatory PSD program in 1974, it again provided for the same exclusions, this time expressly tying them

to the terms "physical change * * * or change in the method of operation." See 39 Fed. Reg. 42,514 (providing that "[a]n increase in the production rate" or in "hours of operation," or "[u]se of an alternative fuel or raw material," "shall not be considered a change in the method of operation."). The agency could presumably have construed the statutory phrase "any physical change * * * or change in the method of operation" to be sufficiently broad to cover those excluded activities. But, from the beginning, it has not done so.

Although even the court of appeals suggested (without fully justifying) that Congress's use of the word "any" could co-exist with an exclusion for activities that had a de minimis impact on emissions, none of the above exclusions were, or could have been, justified on that ground. See Pet. App. 131a-132a. For example, as EPA noted, "by doubling hours of operation, a 500 [tons per year] emitting plant could conceivably double its emissions," an increase that would be "far above any level EPA has ever thought justifiable as *de minimis*." *Id.* at 134a. The same could easily be true of a source that increased its production rate or switched to an alternative, and more polluting, fuel. Yet those exclusions have nonetheless been embodied in both the NSR program and the NSPS program since their creation, and their modern-day successors remain in those programs today. See, *e.g.*, 40 C.F.R. 52.21(b)(2)(iii) (NSR); 40 C.F.R. 60.14(e)(2), (3) and (4) (NSPS).

The same has been true of the treatment of RMRR itself. The terms of the RMRR provision focus on whether an activity is "routine," not whether the increase in emissions caused by the activity would be more than de minimis, and EPA has never construed the exclusion to encompass only de minimis emissions in-

creases. Rather, under the RMRR as it was applied prior to promulgation of the ERP, EPA used a five-factor test to determine whether an activity constituted RMRR, considering the activity's nature, extent, frequency, purpose, and cost. See Pet. App. 3a-4a. Only one of those factors—the project's extent—can be read to refer even indirectly to the effect on emissions caused by the project, and even that factor is properly read to refer to the extent of the work required on the project, not the extent of increase in emissions that would result.[7]

Thus, all of EPA's longstanding regulatory exclusions allow, and some necessarily contemplate, excluding from NSR and NSPS at least some activities that could lead to more than de minimis increases in emissions.[8] Those exclusions date from before Congress

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[7] The court of appeals is correct that EPA stated that it had "*generally* interpret[ed]" the RMRR exclusion—as well as other related provisions—narrowly. Pet. App. 15a (emphasis added) (quoting *id.* at 136a). But EPA has never taken the position that all of those exclusions are categorically limited to activities that will result in only de minimis emissions increases, nor can they plausibly be read in that manner. Indeed, if the exclusions were limited to only activities of that nature, there would have been little if any reason to create or retain them, because the NSR program, which applies only to activities that result in "significant" emissions increases, already excludes activities that result in de minimis emissions increases. 40 C.F.R. 52.21(b)(2)(i) and (23). To be sure, it has always been reasonable, and thus open to EPA, to interpret the pre-ERP RMRR rule narrowly. But nothing in EPA's past general practice precludes the agency from improving or adjusting its regulatory approach in response to current conditions, as it did in adopting the ERP.

[8] The court of appeals was mistaken insofar as it relied on the theory that, "[a]s Congress limited the broad meaning of 'any physical change,' directing that only changes that increase emissions will trigger NSR, no other limitation (other than to avoid absurd results) can be implied."

adopted the statutory NSR program in 1977. Yet Congress did not repudiate EPA's settled understanding of those terms. To the contrary, Congress defined "modification" for the NSR program through a cross-reference to the preexisting NSPS statutory definition that EPA had already construed to include those exclusions. See 42 U.S.C. 7479(2)(C). And the new NSR program that Congress adopted was modeled on the pre-existing PSD regulatory program, which also included those exclusions. See 39 Fed. Reg. 42,514 (1974). The court of appeals disregarded the fact that Congress's acceptance of the prior regulatory constructions, which clearly applied to activities that had more than a de minimis effect on emissions, necessarily confirms the permissibility of those exclusions in the NSR context.

Indeed, Congress specifically demonstrated its awareness and approval of the prior regulations (including the exclusions) by mandating that most of the preexisting regulations (including the cited exclusions) "shall remain in effect" until implementation plans are put in place. 42 U.S.C. 7478(a). While Congress made clear that EPA would have discretion to change the regulations after that time, its awareness of the prior regulatory program, and its evident satisfaction with that program in pertinent part, establishes that the prior program, with its exclusions that cannot be justified on the basis of a de minimis rationale, is at the very least "a defensible construction" of the Act. *TWA*, 432 U.S. at

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Pet. App. 17a. The fact that a "modification" is limited to a "change" that results in an increase in emissions provides no guidance whatever as to which of the several permissible meanings of "change" was intended by Congress.

76 n.11.[9] It necessarily follows that, contrary to the court of appeals' holding, the term "any physical change * * * or change in the method of operation" does contain ambiguities that the agency may reasonably resolve, and that those ambiguities encompass interpretations that exclude some activities that have more than a de minimis impact on emissions.

B. The Question Presented Is Important And Warrants Review At This Time

This Court's review is warranted in this case because the court of appeals' ruling conflicts with *Chevron*, announces an erroneous and harmful rule of statutory construction that unduly constrains agency discretion, and overturns an important regulatory initiative that affects a broad range of industrial activity and that sought to bring greater certainty—and, ultimately, both environmental and economic benefits—to a complex regulatory scheme. The breadth of the court's ruling suggests that, even aside from the specific ERP rule, EPA may be hamstrung in developing other approaches in the future to remedy the deficiencies of the current RMRR exclu-

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[9] That the 1977 Amendments render EPA's pre-1977 approach a "defensible construction" of the Act, see *TWA*, 432 U.S. at 76 n.11, does not mean that it is the only permissible interpretation. See U.S. Br. at 47 n.18, *Environmental Defense* v. *Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006). This Court has concluded that Congress's use of a pre-existing statutory term demonstrated its intent to freeze a pre-existing regulation only when it has found additional clear demonstrations of such congressional intent in the statute or legislative history. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998) (citing statutory language prohibiting use of lesser standard than that incorporated in agency regulations); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437-438 (1986) (noting legislative history specified that statutory definition included prior existing regulatory definition).

sion. More generally, the court of appeals' broad holding threatens a number of other pre-existing exclusions under the Clean Air Act. It also threatens to put EPA into a regulatory straitjacket that Congress did not intend, with few if any options to tailor the program to changing conditions and policies, and thereby to achieve environmental benefits. Given the primacy of the D.C. Circuit in review of administrative action generally, the court of appeals' decision in this case similarly threatens the ability of other agencies that administer statutes employing the word "any" to adapt their regulatory programs to the needs and policies of the governing statute.

1. In adopting the ERP, EPA concluded that a "bright-line rule that would obviate the need for case-by-case review under our multi-factor test of appropriate categories of equipment replacements would be extremely useful in addressing many of the problems that we have identified with the current operation of the NSR program." Pet. App. 57a. EPA concluded that the policy of the NSR program "is not to cut back on emissions from existing major stationary sources through limitations on their productive capacity, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so." *Id.* at 35a. Yet EPA noted criticisms of its pre-ERP RMRR approach, which often "disallows replacement of significant plant components with identical or functionally equivalent components," such that "the effect is to discourage plant owners or operators from engaging in replacements that are important to restoring, maintaining and improving plant safety, reliability, and efficiency." *Id.* at 31a; see *id.* at 35a (RMRR approach has led "sources to refrain from replacing components,

to replace them with inferior components, or to artificially constrain production in other ways").

The problems of the pre-ERP approach were exacerbated by the uncertainties inherent in its case-by-case, multifactor nature. EPA noted that, under the pre-ERP rule, "it takes a year, on average, to obtain a determination whether a proposed replacement is routine." Pet. App. 57a. Such a delay "creates perverse disincentives to refrain from equipment replacements and instead repair existing equipment or find some other solution." *Ibid.* It is "also problematic for State and local reviewing authorities," who must "devote scarce resources to make complex determinations" that "are consistent with determinations made for similar circumstances in other jurisdictions." *Id.* at 34a. Indeed, the uncertainties act to "discourage replacements that would promote safety, reliability and efficiency even in instances where, if the matter were brought to EPA, we would determine that the replacement in question was RMRR." *Id.* at 35a.

The ERP "significantly reduce[s]" those problems. Pet. App. 35a. Its effect "should be to remove disincentives to undertaking RMRR activities falling within the rule, thereby enhancing key operational elements such as efficiency, safety, reliability, and environmental performance." *Id.* at 36a. The ERP's effects include "providing the certainty needed to plan and undertake efficiency investments," encouraging firms "to take advantage of * * * new, innovative pollution-reducing technologies," and "preserv[ing] powerful incentives * * * to adopt 'leap-frog' technologies," all of which will lead to reduced costs *and* reduced pollution. *Id.* at 107a-108a (emphases omitted). Indeed, EPA concluded that the ERP's effect of "promoting proper operational planning to facilitate safe, reliable, and efficient operations," "will

have the corresponding environmental benefit of reducing the amount of pollution generated per product produced," as well as "reduc[ing] the resource burden on reviewing authorities" under "the existing, case-by-case process." *Id.* at 44a.

2. The court of appeals' decision invalidating the ERP thus negated a very substantial EPA regulatory initiative to resolve deep-seated problems in the NSR program and the RMRR exclusion, while achieving both economic and environmental benefits. If not reversed, the decision below also threatens to eliminate EPA's ability to address those problems in the future. The court ruled that the agency must choose the broadest reading of the phrase "any physical change," because "Congress's use of the word 'any' indicates the intent to cover all of the ordinary meanings of the phrase." Pet. App. 14a. That ruling casts into doubt even the pre-existing RMRR exclusion, which by its terms and as historically construed encompasses activities that are within the broadest meaning of "physical change."

To be sure, the court of appeals did concede that a narrower construction could be used if the broadest construction would lead to "strange and indeterminate" or "absurd" results, Pet. App. 8a, 14a, or if the narrower construction would have a de minimis effect on emissions, *id.* at 13a-14a. Those qualifications, however, do not alleviate the problems created by the court of appeals' mistaken reading of the statute. The pre-existing RMRR exclusion, and the multifactor test that has been employed to apply it, have never expressly been limited to activities that have a de minimis effect on emissions, nor have they been limited to the avoidance of "absurd" results. Instead, the agency has engaged in a reasonable effort to differentiate routine efforts designed to

maintain an existing facility from activities that amount to a change in the physical plant or its method of operation. Any other means that EPA may consider to address the basic problems targeted by the RMRR exclusion would likely be problematic or impracticable in view of the severe constraints imposed by the court of appeals.

Moreover, as noted above, both the NSPS and NSR programs have included since their inception additional exclusions for hours of operation increases, production rate increases, and fuel and raw material switching. The court of appeals' conclusion places in doubt those other longstanding exclusions as well, because they may be found to exclude activities that fit within "one of the ordinary meanings" of "physical change * * * or change in the method of operation." Pet. App. 7a. The de minimis exception recognized by the court of appeals is of no avail, because none of those exclusions can be justified on the ground that it will have only a de minimis effect on emissions. See pp. 16-19, *supra*. Without further review, the court of appeals' decision will cast a shadow over even those exclusions and long-settled expectations regarding the scope and coverage of the NSR and NSPS programs.

3. Finally, even aside from its effects on EPA's ability to tailor the NSR and NSPS programs to changed circumstances and policies, the court of appeals' decision poses a substantial threat to every regulatory agency entrusted with administering a statute that uses the word "any." The court of appeals stated that, aside from settings "in which the Supreme Court has required heightened standards of clarity to avoid upsetting fundamental policies," Pet. App. 8a, "when Congress places the word 'any' before a phrase with several common

meanings, the statutory phrase encompasses each of those meanings; the agency may not pick and choose among them," *id.* at 12a. Thus, although this Court has never used the mere presence of the word "any" in a statute to reject an agency's choice among several permissible meanings of the words that follow, and indeed took the opposite approach in *Chevron* itself, the court of appeals' reasoning threatens to eliminate all agency discretion whenever the word "any" appears before an ambiguous word or words in a statute.

It is entirely consistent with this Court's decisions, common sense, and the *Chevron* doctrine to acknowledge that the word "any" has a generally expansive meaning, while also acknowledging that it does not eliminate all statutory ambiguities that would otherwise be open to agency interpretation. As this Court's frequent cases construing statutes that use the word "any" underscore, the court of appeals' non-contextual interpretation of that term threatens agency authority in a broad range of areas. Further review is warranted to correct the court of appeals' failure to abide by the dictates of this Court's decision in *Chevron*, and to remedy the harms caused by its drastic and unjustifiable constriction of agency discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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